INSOLVENCY & BANKRUPTCY CODE, NCLT & NCLAT - Introduction, Opportunities & Approach



SIRC of ICAI, Chennai

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B.RAMANA KUMAR,
M. Com., LLB, FCA, ACMA IP,DISA(ICA)
Advocate

OVOPAX LEGAL

NATIONAL COMPANY LAW TRIBUNAL

- The Central Government has constituted National Company Law Tribunal (NCLT) under section 408 of the Companies Act, 2013 (18 of 2013) w.e.f. 01st June 2016.

- **sixteen Benches**, one Principal Bench at New Delhi and at
- New Delhi: Principal bench and five additional benches.
- Ahmedabad: Two benches.
- Prayagraj: One bench.
- Bengaluru: One bench.
- Chandigarh: One bench.
- Chennai: Two benches.
- Cuttack: One bench.
- Guwahati: One bench.
- Amaravati Bench
- Hyderabad: Three benches, one of which is at Amaravathi.
- Jaipur: One bench.
- Kochi: One bench.
- Kolkata: Two benches.
- Mumbai: Five benches.
- Indore: Not yet notified.

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NCLAT was constituted under Section 410 of the Companies Act, 2013 situated in Delhi and Chennai

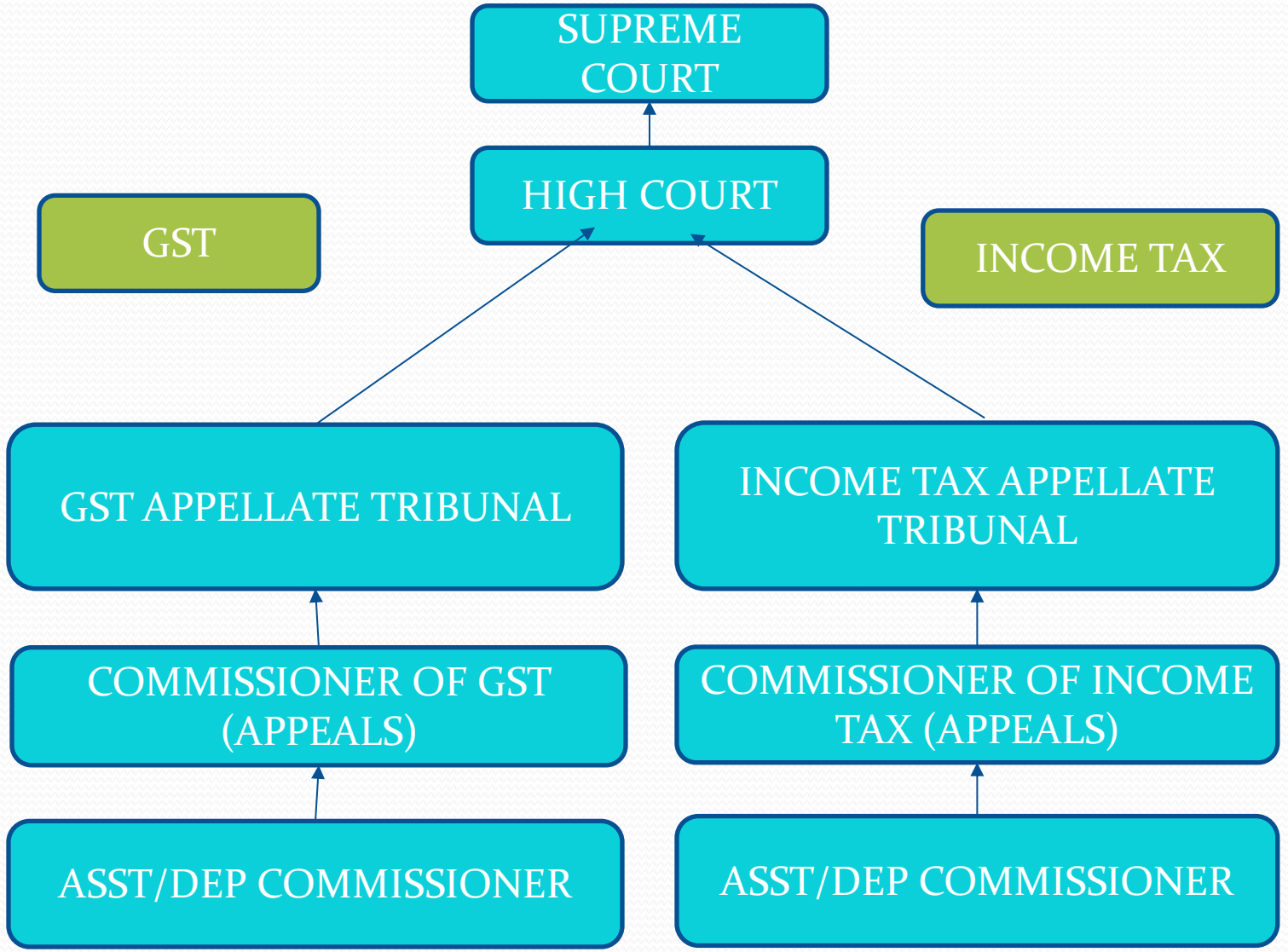
Appeals against the orders of NCLT, with effect from 1st June, 2016.

NCLAT is also the Appellate Tribunal for hearing appeals against the orders passed by NCLT(s) under Section 61 of the IBC, with effect from 1st December, 2016.

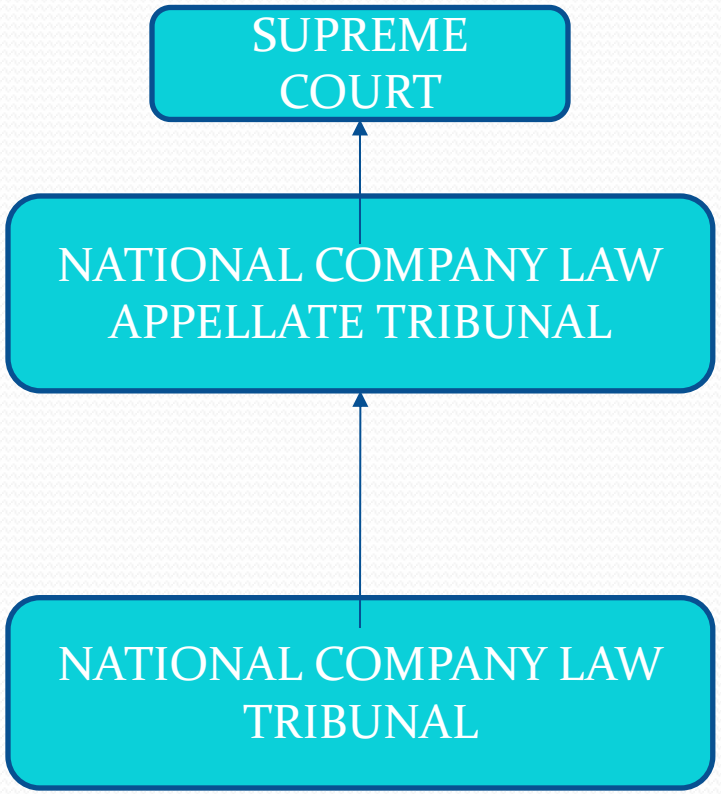
NCLAT is also the Appellate Tribunal for hearing appeals against the orders passed by Insolvency and Bankruptcy Board of India under Section 202 and Section 211 of IBC.

NCLAT is also the Appellate Tribunal to hear appeals against any order passed by the Competition Commission of India (CCI) – as per the amendment brought to Section 410 of the Companies Act, 2013 by Section 172 of the Finance Act, 2017, with effect from 26th May, 2017.

GST & ITAT


SUPREME COURT
HIGH COURT
GST
INCOME TAX
GST APPELLATE TRIBUNAL
INCOME TAX APPELLATE TRIBUNAL
COMMISSIONER OF GST (APPEALS)
COMMISSIONER OF INCOME TAX (APPEALS)
ASST/DEP COMMISSIONER
ASST/DEP COMMISSIONER

NATIONAL COMPANY LAW TRIBUNAL



Opportunities in NCLT & NCLAT



Various opportunities

- CA can appear on behalf of clients in the NCLT and NCLAT just like in ITAT .

Opportunities before NCLT & NCLAT

Existing Important Areas of Practice before CLB-

- Oppression & Mismanagement
- Rectification of Register of Members
- Compounding of Offences
- Repayment of Deposits
- Other approvals under the Act

Important New Areas before NCLT for CAs

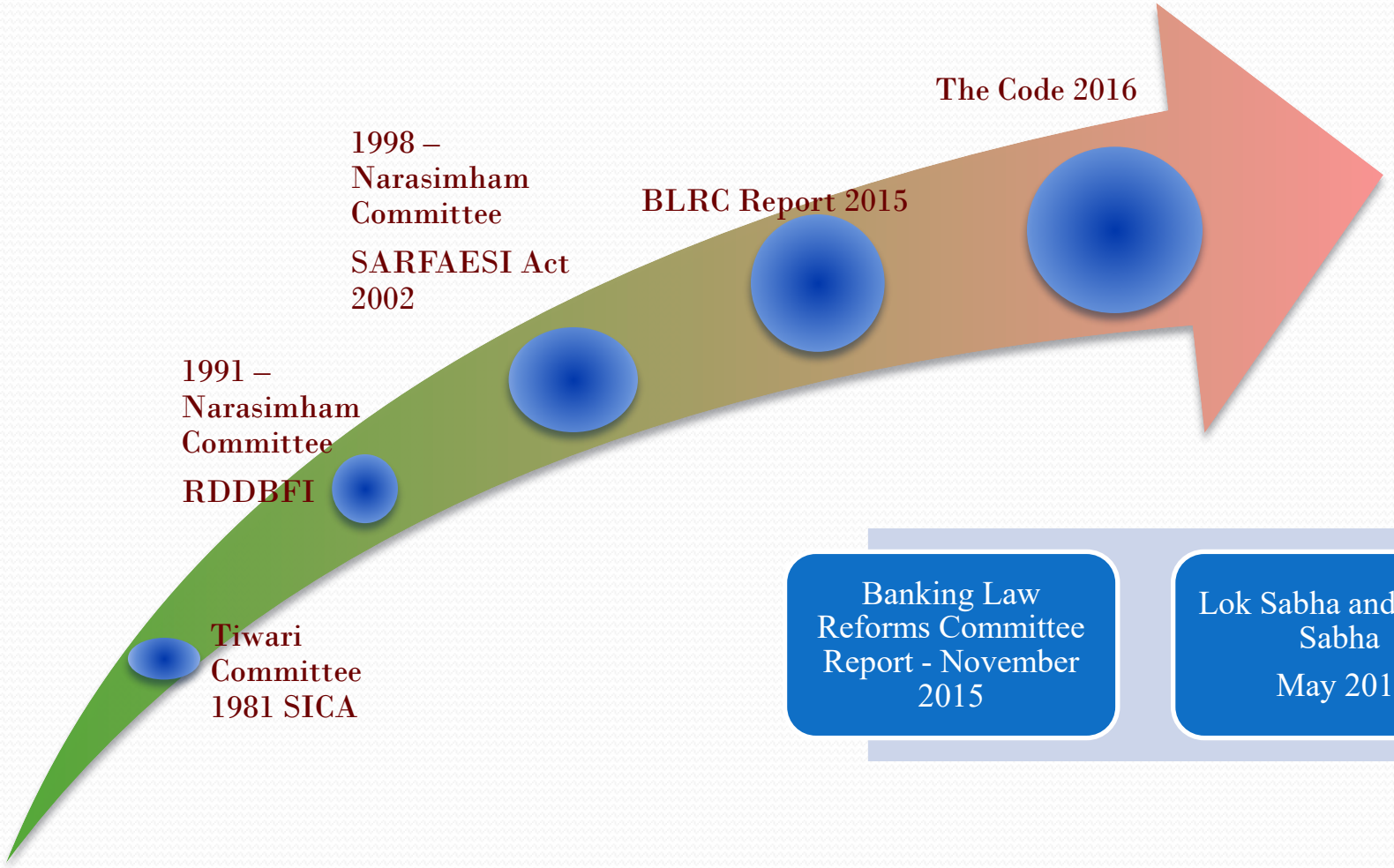
- Mergers / Demergers
- Reduction of Capital
- Winding Up
- Revival of Sick Companies
- Class Action
- Conversion of Public to Private and
- Other approvals under the Act



Opportunities for Chartered Accountants as Insolvency Professionals and in NCLT & NCLAT

Evolution of the code

Movement from Debtor in Possession to Creditor in Control



Banking Law Reforms Committee Report - November 2015

Lok Sabha and Rajya Sabha
May 2016

President's assent
28 May 2016

A NEW ETHOS OF DEBT RESOLUTION

"The limited liability company is a contract between equity and debt. As long as debt obligations are met, equity owners have complete control, and creditors have no say in how the business is run. When default takes place, control is supposed to transfer to the creditors; equity owners have no say"

The Banking Laws Reform Committee report – November 2015

Debtor in Possession to Creditor in Control

Need for a New Law

- **Recovery of debts – Too late and Too little**
- **Debt market – stunted and scared**
- **Impacted Global index of Ease of doing business**
- **Balance Sheet Test driven and not liquidity driven and hence No Early Warning Systems for resolution**

NEED FOR A NEW LAW

Multiple laws governing Debt resolution

Multiple Forums

Balance Sheet Test driven and not liquidity driven

No Early Warning Systems for resolution

Debtor in possession is fraught with conflicts in process and risks

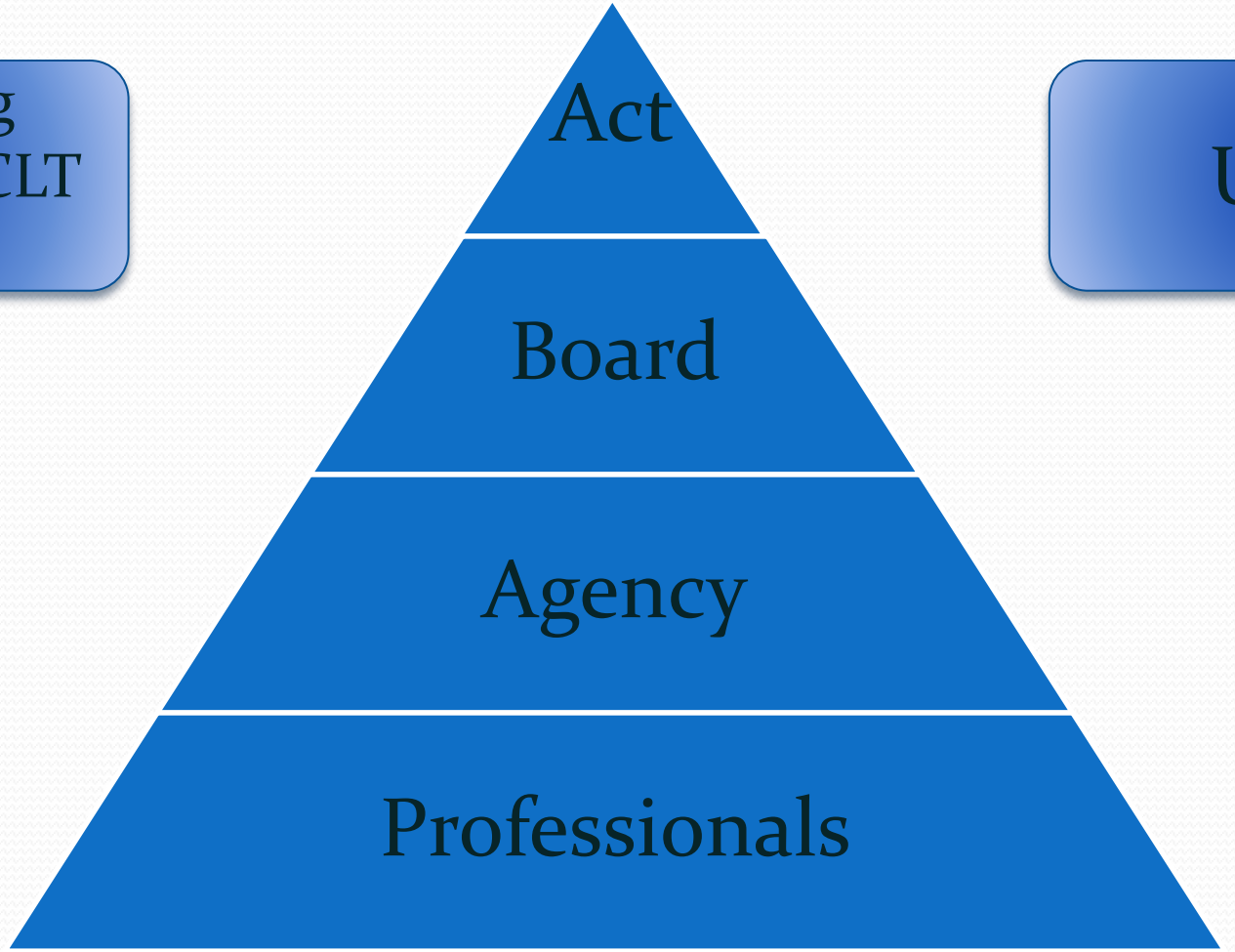
Recovery of debts – Too late and Too little

Debt market – stunted and scared

Impacted Global index of Ease of doing business

THE CODE MECHANISM

Adjudicating Authority – NCLT and DRT



Utility

Creditor in Control
and
Role of a Resolution Professional

Debtor in possession

Control and custody of assets continue to vest with debtors even in the event of a debt default.

Promoters continue to stay in control with limited rights to creditors except for secured financial creditors who have the right to repossess assets of the defaulter

Debtor in possession

Debtor in possession presents the following issues

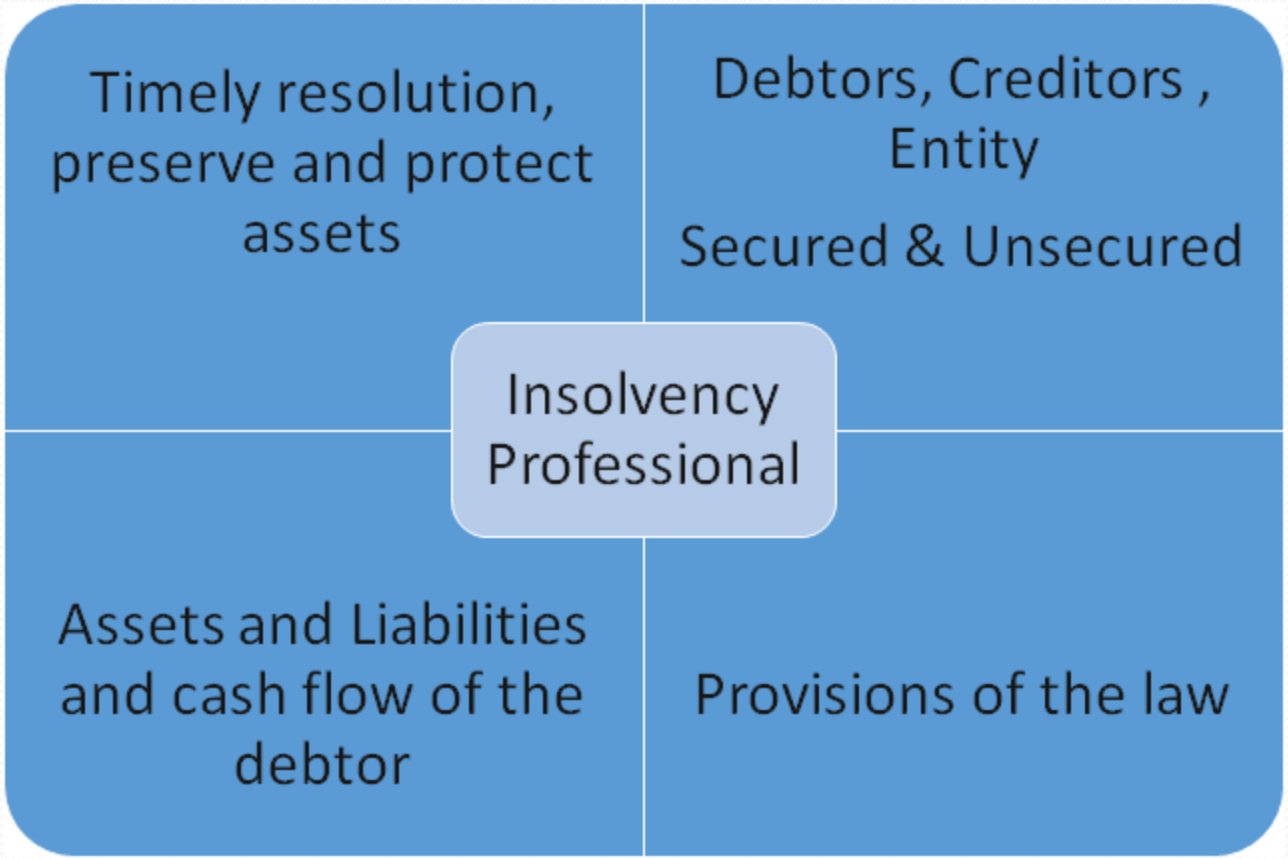
- Emphasis on secured credit only
- SME's are starved of credit because they are unable to provide collaterals
- Debtor in possession is also fraught with possibilities of mishandling of assets of the enterprise by promoters

Creditor in Control

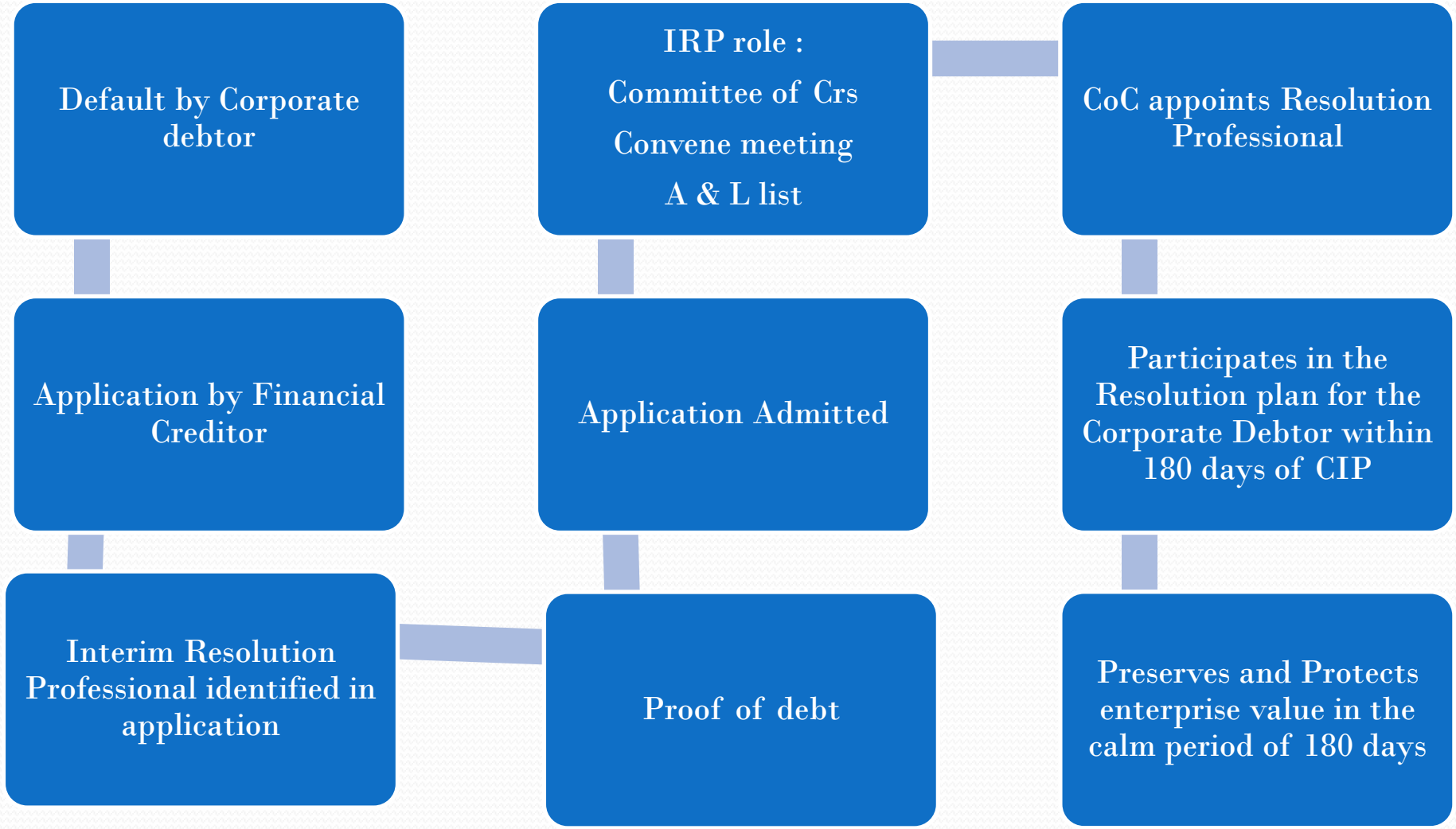
- The IBC proposes a Creditor in Control scenario
- Once a default occurs, it is the Committee of Creditors who are empowered to make a decision
- Committee of creditors is constituted to comprise all the financial creditors of the enterprise
- All decisions of the CoC is by 75% majority
- Voting share is based on value of debt owing to the creditor

Need for IP's

- Creditor in Possession necessitates a "trustee" to act on behalf of the creditors and debtors. Hence the need for an insolvency professional
- The Act provides for a separate category of professionals to be registered for this purpose
- The IP can be an Interim Professional, Resolution Professional or a Liquidator depending on the circumstances and the phase of operation



Insolvency professionals



Insolvency professionals

Individuals

Fresh Start Order

Chapter III for Individuals – Part II

Individual Insolvency Resolution Process

Chapter III for Individuals – Part III

Individual Bankruptcy Process

Chapter IV – Part II

Corporate Debtors

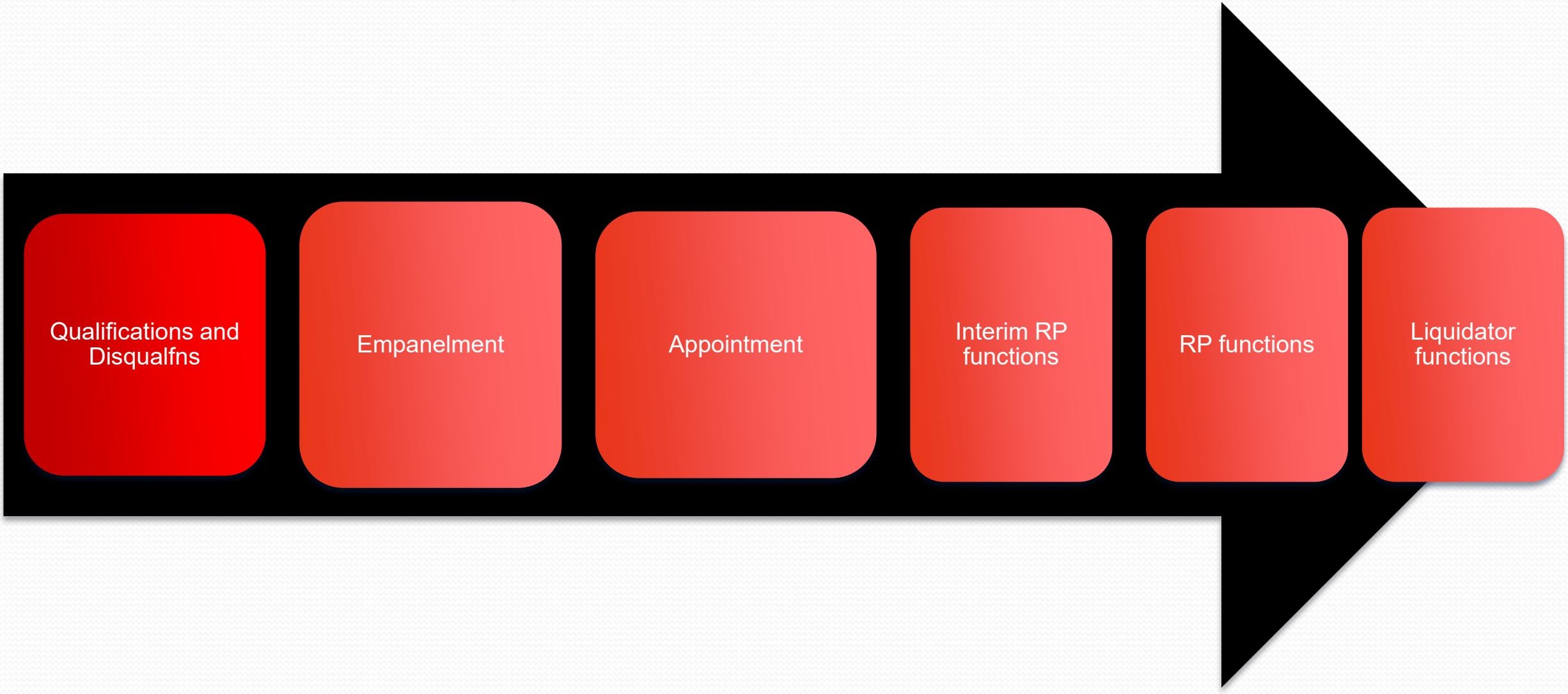
Corporate Insolvency resolution Process

Chapter II – Part II

Liquidation of a Corporate Debtor

Chapter III – Part II

Insolvency professionals



IP QUALIFICATIONS

Professionals	Others
Graduate (?) + 15 years experience and enrolled with the relevant professional institute CA CWA CS Lawyer Actuary	Graduate (?) + 3 out of last 10 years experience in Financial service provider ARC Debt Restrucuring Turnaround work Liquidation Amalgamations and mergers Winding up Debt finance Monitoring / recoveries of stressed assets Etc..

IP DISQUALIFICATIONS

- Convicted by any competent court for an offence punishable with imprisonment for a term exceeding six months or for an offence involving moral turpitude or any economic offence, and a period of five years has not elapsed from the date of expiry of the sentence
- undischarged insolvent, or has applied to be adjudicated as an insolvent;
- Been declared to be of unsound mind;
- Minor;
- Not a fit and proper person;
- Not qualified the Insolvency Professionals Examination
- Not enrolled with an insolvency professional agency or the insolvency professional agency with which he claims to be enrolled, has not been appropriately registered or the period of its registration has expired;
- Not a person resident in India

Insolvency professionals

Disclosing the registration number assigned to him by the Board and affirming that he is qualified to practise as an insolvency professional

Disclosing the number of cases of corporate insolvency resolution process for which he is currently serving as an interim resolution professional, resolution professional or liquidator

Disclosing any of the following situations, which may result in conflict of interest in respect of his appointment :

The existence of any pecuniary or personal relationship between him and the corporate debtor; and the persons entitled to a distribution if the corporate debtor were to be liquidated and its assets were to be distributed in accordance with section 53 of the Code, (collectively stakeholders);

If he is a relative of any of the stakeholders, or is a shareholder of such stakeholder, or is any principal or employee, or is a business partner or has a controlling interest in the business of any of the stakeholders;

If he has, at any time during the previous three years, had a professional, financial or business relation with the stakeholders

Certifying that there are no disciplinary proceedings pending against him with the Board or the insolvency professional agency he is a member of

Insolvency professionals

1. **Enrolment with the IP Agency**
2. **Application to the Insolvency Board (IBBI)**
3. **Examination to be passed**
4. **Certificate of Registration of the RP by IBBI**
5. **Transitional registration**
6. **Renewal of Certificate**
7. **Provision for cancellation etc**

RP – Role as IRP – Rights (Sec 17 to 20)

- Management of the debtor from the date of appointment vests with IRP
- Powers of the BoD / partners of LLP are suspended
- Officers and managers report to the IRP
- Financial institutions act on instructions of the IRP
- IRP executes deeds and documents on behalf of the corporate debtor
- Takes actions with the specification of the BoD
- Access to all information in the Information utility

RP – Role as IRP – Duties (Sec 17 to 20)

Collect all information	**List of Assets and Liabilities as at initiation date** **Business operations for 2 years** **Financial and operational payments for 2 years** **Other information**
Collate Claims	Received in pursuance of public announcement by Adj. Authority (NCLT)

RP – Role as IRP – Duties (Sec 17 to 20)

Constitute Committee of Creditors	All financial creditors Care on related parties Assignment of voting share Provide all information to CoC Hold first meeting within 7 days

RP – Role as IRP – Duties (Sec 17 to 20)

Manage Debtor entity as a going concern	• Operating professionals report to IRP • Appoint other professionals (CA, lawyers) • Enter into contracts / amend / modify • Raise interim finance with consent as required from secured creditors
Assets of the debtor	List , Monitor , Preserve and protect Manage Operations till RP is appointed

Roles of an RP (Sec 17 to 20)

Resolution professional

IRP = 30 days
Confirmed or replaced by the CoC and Resolution Professional Role comes into existence

RP – Role as RP – Duties

Administer	Appoint relevant professionals Interim finance with consent of CoC Abide by law to ensure that certain actions are done only with the Consent of the CoC
Information memorandum	Prepare Information memorandum
Resolution Plan	Invite key stakeholders to discuss and put forth resolution plans (within 180 days)

RP – Role as IRP – Duties

Resolution Plan	Seek extension as may be necessary Submit to NCLT for approval Revise The resolution plan

Roles of Liquidator

Liquidation Triggers

- Non receipt of resolution plan within 180 days
- Resolution plan rejected by AA and order passed
- Decision of CoC (before resln plan) to liquidate
- Contravention of Resolution Plan

Roles of Liquidator

Claims	Collect Collate Maintain records Update and settle
Assets	Preserve and protect Custody and Control Sell moveable and immoveable property
Operations	Carry on for beneficial liquidation Draw and accept NI, Pro notes etc Represent the entity as the official liquidator

Roles of Liquidator

Other Acts	**Investigate transactions** **Avoid certain types of transactions** **Initiate and defend legal suits and proceedings** **Obtain professional assistance** **All steps for liquidation**
Progress Report	**Progress report to IBBI**

Roles of Liquidator

Liquidation Estate	**Aggregate all assets into a liquidation estate** **Maintain priority of payments as specified by law**
Dissolution	**Application for dissolution of the liquidation estate**


Trim your sails
to be in NCLT &
NCLAT
SEA CLOUD

Preparing for the opportunities

Knowing the Constitution, Powers, Procedures of NCLT.

To read the relevant provisions (Chapter XXVII & XXVIII) under Companies Act, 2013 and NCLT Rules thoroughly.

Preparing for the opportunities

Time Management

As more time needs to be spent in Court, schedule and allocate time for other work… traditional practice on auto mode??

Court's Time

To be precise and brief in presentation so that precious time of the Court is not wasted.

Preparing for the opportunities

Getting the Facts

To get the facts completely before taking the brief and to prepare a case sheet for all the cases showing the plus and minus of each case.

Keeping track of Judgments passed by other Tribunals, High Courts and Supreme Court in Corporate Laws.

To subscribe for various law journals and legal websites for judgments.

Preparing for the opportunities

Tracking the dates & *Adhering to the time lines*

To keep track of the dates of hearing by maintaining a diary exclusively for NCLT.

To *complete the pleadings as per* the directions of the tribunal.

Preparing for the opportunities



Understanding the Member



To present the case and to refer the documents taking into consideration the background of the member i.e., Technical / Judicial



Understanding the other counsel / CA/CS/…



To observe and analyze the strength of the other side counsel.

Preparing for the opportunities

To refer to Case laws

To analyze and identify case-law from the journals/website to support the legal position.

Maintaining Files

Proper storage space to be provided in office. Each case shall have separate file.

Preparing for the opportunities

Thinking on the feet

Possible only when we are strong on facts and law and very importantly not getting nervous during the course of arguments.

Observing in the Court

To observe other matters in the court to know the approach of the judge.

Preparing for the opportunities

Devil's Advocate

Approaching the client as other side counsel in order to prepare answers for all probable questions that may be raised by other side.

Making things simple

Even complicated matter has to be presented to the court in a simplified manner.

Preparing for the opportunities

Cordial Relationship

To maintain cordial relationship with fellow professionals. Not to have any personal grievance against the other side counsel/representative.

Last but not the least .....

To act as a Court Officer and assist the Court for the speedy and proper disposal of the matter.

CAs as IRP/RP and in NCLT & NCLAT

- New Area of Practice
- Good alternate to regular and traditional practice
- Understanding new roles and responsibilities
- Ethical discharge of duties
- Maintain Independence



QUESTIONS & COMMENTS



B.RAMANA KUMAR M. Com., LLB, FCA, ACMA IP,DISA(ICA)
ADVOCATE & INSOLVENCY PROFESSIONAL
51A DR RANGA ROAD,
MYLAPORE, CHENNAI-600004

PHONE 9841113024
ramanakumar@ovopaxlegal.com ,
ramanaechambers@gmail.com

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